

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Smokehouse Brewpub, LLC d/b/a
Northbound Smokehouse & Brewpub,
a Minnesota limited liability company,

Court File No. 16-CV-02871

Plaintiff,

**AFFIDAVIT OF JOHN A. SULLIVAN
IN OPPOSITION OF MOTION TO
ENFORCE JOINT STIPULATION**

V.

Lucid Brewing LLC d/b/a
Inbound BrewCo, d/b/a North Loop Brewco,
a Minnesota limited liability company,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

John A. Sullivan, being first duly sworn upon oath, states as follows:

I am an attorney licensed by the State of Minnesota and practicing law at the law firm of Peterson Habicht, PA, 33 South Sixth Street, Suite 3900, Minneapolis, Minnesota 55402. I represent Plaintiff Smokehouse Brewpub, LLC d/b/a Northbound Smokehouse & Brewpub ("Northbound") in the above-captioned matter and make this Affidavit on the facts and circumstances to the best of my personal knowledge.

1. Attached as Exhibit A is a true and correct copy of Northbound's email correspondence with Defendant's Counsel on September 22, 2016.

2. Attached as Exhibit B is a true and correct copy of Shakopee Brewing's specimens accepted by the USPTO with the Notice of Acceptance.
3. Attached as Exhibit C is a true and correct copy of the Alcohol and Tobacco Tax and Trade Bureau Frequently Asked Question section regarding beer and personalized growler labels.

FURTHER AFFIANT SAYETH NOT.

Dated: October 26, 2016

John A. Sullivan
John A. Sullivan

Subscribed and sworn to before me
this 26th day of October, 2016.

Rosemary L. Duffy
Notary Public

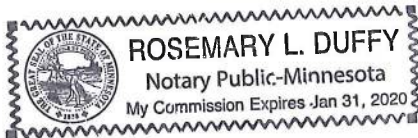


EXHIBIT A

John Sullivan

From: John Sullivan
Sent: Thursday, September 22, 2016 1:50 PM
To: 'Walz, Bradley'
Cc: Anderson, Wesley D.; Chambers, Tucker A.; 16230.13.imanage@file.winthrop.com; Gregory Perleberg
Subject: Stipulation to Amend Complaint and Suspend North Loop Cancellation

Hi Brad,

Per our phone call, if you are still willing to forgo bringing a Motion to Dismiss, we will agree to remove Count Three (State Unfair Competition and Trademark Infringement), Count Four (Common Law Unfair Competition), and remove "INBOUND" from Count 1. We also agree to remove "OUTBOUND" from Count One if the USPTO does not register the mark. We believe the USPTO will approve the specimen and the mark will be registered in the next few weeks though.

We are willing to consent to suspending the NORTH LOOP cancellation proceeding until the termination of this civil proceeding. I will allow you to file the consent motion.

On a different note, it came to our attention the day after we served the Complaint (August 26) that a person created the domain name www.northboundsmokehouse.com. As you can see, the link directs people to Lucid Absinthe Superieure's web page. We sent a letter to Lucid Absinthe and requested it assign the infringing domain name to Northbound. Its Counsel denied any involvement and said, "Our client does not own the domain name 'northboundsmokehouse.com' and does not control the website at 'northboundsmokehouse.com.'" See below. We do not believe that Lucid MN is behind these activities or is the owner of the domain name either but we just wanted to confirm for our own assurance that Lucid MN is not in any way connected to creating this infringing domain name. Can you please confirm.

Let me know if you have any additional questions.

Thanks,
John



John Sullivan, Attorney
DIRECT 612.836.5510 / **CELL** 320.492.1661
EMAIL jsullivan@petersonhabicht.com
ASSISTANT Rose Duffy / 612.836.5527 / rduffy@petersonhabicht.com

PETERSON HABICHT, PA
33 South Sixth Street, Suite 3900 | Minneapolis, MN 55402
MAIN 612.836.5500 **FAX** 612.836.5599
Visit our new website petersonhabicht.com

From: David P. Petersen [<mailto:david.petersen@klarquist.com>]
Sent: Monday, September 12, 2016 3:01 PM
To: Rose Duffy
Cc: Gregory Perleberg
Subject: RE: Correspondence From Attorney Gregory B. Perleberg

Dear Mr. Perleberg and Ms. Duffy:

This responds to your letter. As explained below, Hood River Distillers is another victim here. Our client appreciates the fact that you have brought this to its attention.

Our client does not own the domain name "northboundsmokehouse.com" and does not control the website at "northboundsmokehouse.com". Our client has reviewed its list of registered domain names and northboundsmokehouse is not on the list.

Our client also does not control and has not authorized any linkage from northboundsmokehouse.com to our clients domain www.drinklucid.com; nor did our client authorize anyone to put any reference to Hood River Distillers on the northboundsmokehouse.com web pages.

It appears that a third party unaffiliated with our client has copied one or more pages from an old website of our client and did not delete any links from the copied materials. Our client has reported this to GODADDY in an attempt to have this remedied.

If you find out who is behind this activity, we would appreciate you letting us know.

Please direct any future correspondence relating to this matter to my attention.

We trust that this resolves the matter.

David P. Petersen

David P. Petersen
Partner

Klarquist **75**
YEARS

One World Trade Center
121 SW Salmon Street, Suite 1600
Portland, OR 97204 U.S.A.

P: 503.595.5300
F: 503.595.5301

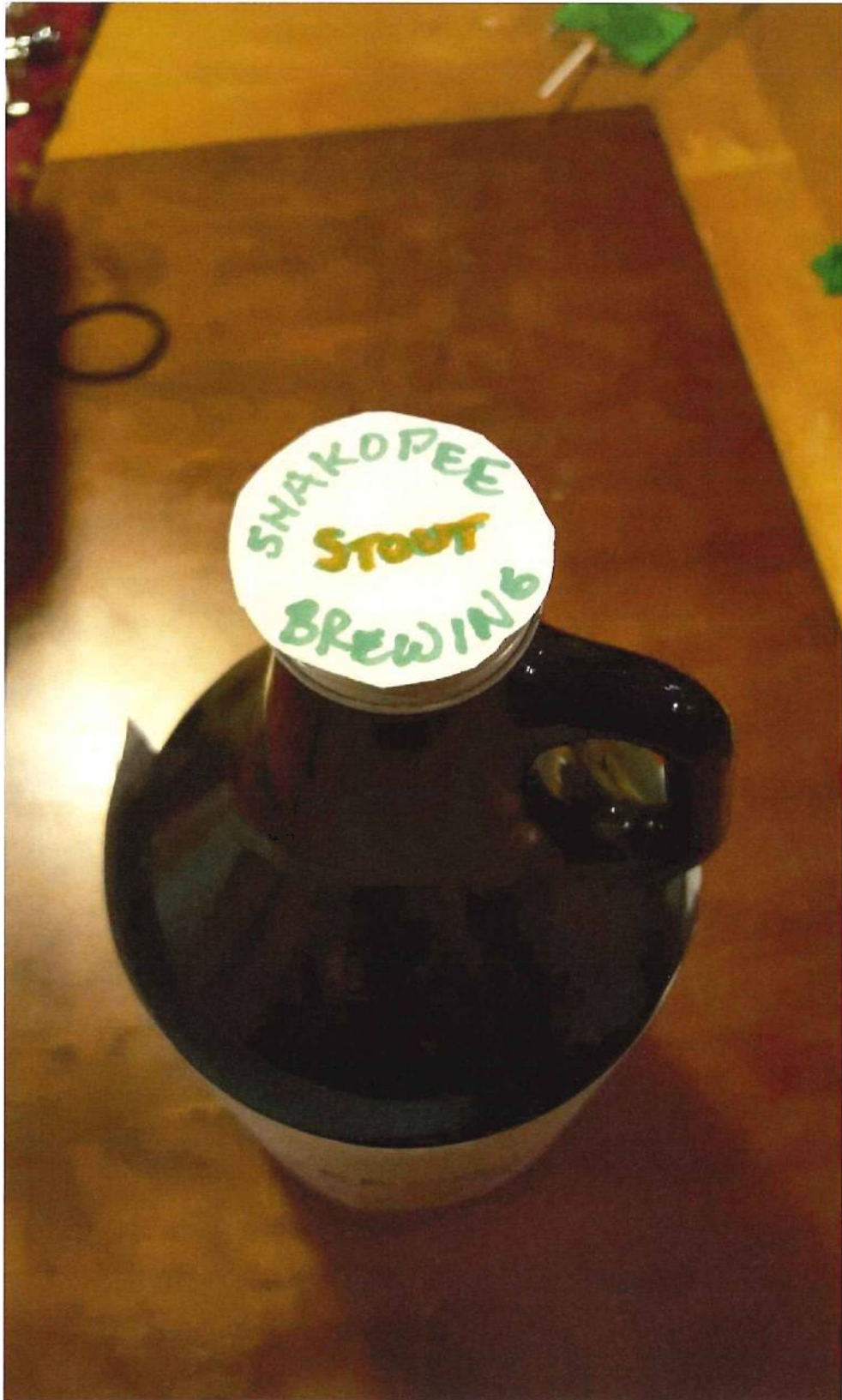
email | website

Celebrating 75 years of IP excellence.

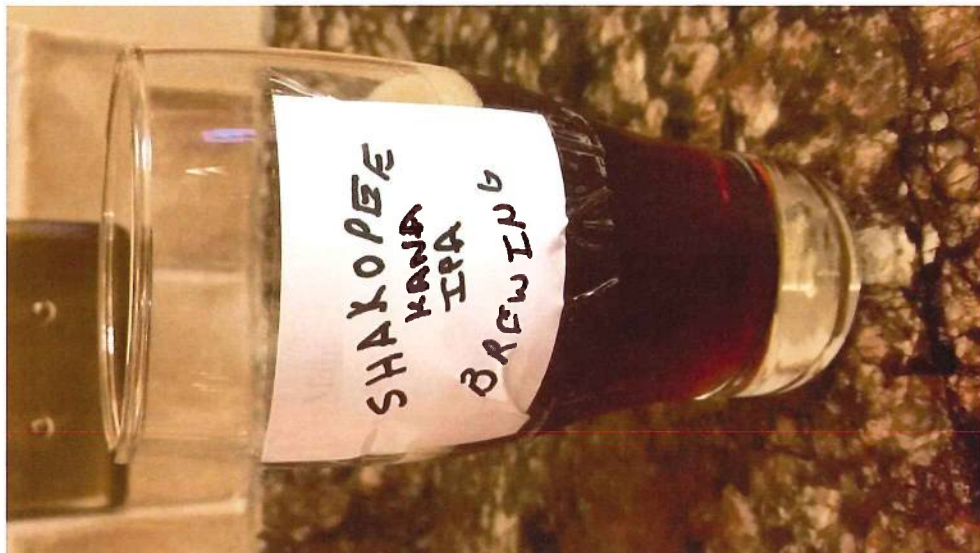
The information contained in this e-mail is confidential and may be legally privileged. It is intended solely for the addressee. Access to this e-mail by anyone else is not authorized. If you are not the intended recipient, any disclosure, copying, distribution, use, or any action you take or fail to take in reliance on it, is prohibited and may be unlawful. Please immediately notify us by telephone (collect) or return e-mail, destroy the original message, and retain no copy - on your system or otherwise.

EXHIBIT B









From: TMOOfficialNotices@USPTO.GOV
Sent: Thursday, December 17, 2015 00:11 AM
To: ipdocketingLA@venable.com
Cc: gperleberg@venable.com ; bjbanks@venable.com
Subject: Official USPTO Notice of Acceptance of AAU: U.S. Trademark SN 86306679: SHAKOPEE: Docket/Reference No. D5502-5003

NOTICE OF ACCEPTANCE OF AMENDMENT TO ALLEGE USE

U.S. Serial Number: 86306679
Mark: SHAKOPEE
Owner: DILEMMA BREWING COMPANY, LLC
Docket/Reference Number: D5502-5003

The USPTO has accepted the Amendment to Allege Use (AAU) filed for the trademark application identified above as meeting the minimum filing requirements of 37 C.F.R. §2.76(e). The application was returned to the examining attorney for a substantive review of the AAU, which may result in the issuance of a refusal and/or additional requirement(s).

WARNING: The filing of the AAU does **not** relieve the applicant of the duty to file a response to any outstanding Office action or to take any other action required in the case, including filing a Notice of Appeal.

To check the status of the application, go to http://tsdr.uspto.gov/#caseNumber=86306679&caseType=SERIAL_NO&searchType=statusSearch or contact the Trademark Assistance Center at 1-800-786-9199. Please check the status of the application at least every three (3) months after the application filing date.

To view this notice and other documents for this application on-line, go to http://tsdr.uspto.gov/#caseNumber=86306679&caseType=SERIAL_NO&searchType=documentSearch. NOTE: This notice will only become available on-line the next business day after receipt of this e-mail.

For further information, including information on filing and maintenance requirements for U.S. trademark applications and registrations and required fees, please consult the USPTO website at <http://www.uspto.gov/trademarks/> or contact the Trademark Assistance Center at 1-800-786-9199.

EXHIBIT C



[TTB Home](#) > [Brewing Industry](#) > [TTBCov Beer FAQs](#)



Beer FAQs

Print

► **B1: What are the guidelines regarding brew-on-premises (‘‘brew your own’’ facilities)?**

► **B2: How do I determine the barrel equivalent of beer containers?**

► **B3: Must TTB approve my operations when I intend to make beer?**

► **B4: If TTB must approve my operations to make beer, how do I apply?**

► **B5: When I have applied, can I start to make beer?**

► **B6: How much does it cost if TTB approves my operations to make beer?**

► **B7: Where can I find surety (insurance) companies who may provide a bond?**

► **B8: Does TTB have the regulations and forms for beer on its Web site?**

▼ **B9: What is TTB’s policy with respect to ‘‘growlers’’?**

What are the concerns for filling a ‘‘growler’’?

A growler is either a bottle or a large glass. The distinction is solely dependent on the manner in which the brewer fills the container.

When is a growler a ‘‘bottle’’?

A growler is a bottle when the brewer fills the container in advance of sale. The brewer may fill the growler prior to removal, on the brewery premises, or after tax determination on the brewpub premises.

When is a growler a ‘‘large glass’’?

A growler is a large glass when a consumer uses the container to make a purchase and the brewer then fills the container. Consumers may furnish their own growler or may purchase it from the brewer.

When is tax determined on beer used to fill growlers?

There are two conditions for tax determination (please refer to §§25.25(c), 25.157, and 25.158).

- ☐ If the brewer fills a ‘‘bottle’’ on the brewery premises, the tax is determined upon removal for consumption or sale. Since the growler is a bottle, tax is determined on the stated net contents.
- ☐ If the brewer fills a ‘‘glass’’ on the brewpub premises, the brewer must fill it from a tank that is tax determined.

What are the labeling requirements for growlers?

When you are required to label your growler you should note that the label must contrast with the background. If you silkscreen your containers, the ink colors must contrast with the filled containers.

What are the requirements for the government warning label?

The Alcoholic Beverage Labeling Act (ABLA) of 1998 applies to sealed containers the brewer offers for sale to consumers. The ABLA does not apply to glasses or containers a brewer uses to serve beer at the brewpub. These containers do not meet the definition for a sealed container in which an alcohol beverage is offered for sale to the public.

However, the law applies to any keg or serving tank from which the brewer dispenses beer to containers. The brewer must apply a government warning label to the keg or tank. The brewer must comply with 27 CFR Part 16 regardless of whether the public has view of the keg or tank.

The statement must comply with these conditions.

- ☐ It must be legible under ordinary conditions, and on a contrasting background.
- ☐ The words ‘‘GOVERNMENT WARNING’’ must be in capital letters and bold type. The rest of the statement may not appear in bold type.
- ☐ The maximum number of characters per inch of the warning statement is 25. All characters, including both upper and lower case, must be a minimum 2 millimeters in size.

What are the requirements for growlers that are glasses?

When the brewer fills a growler at the tap at the brewpub, and not in advance of sale, we consider the growler as a large glass sold at retail. These growlers are not subject to Federal labeling requirements. Some States consider this bottling activity and regulate accordingly. Brewers should check with State authorities.

What are the requirements for growlers that are bottles?

When the brewer fills on the brewery premises or on the brewpub in advance of sale, the growler is a bottle subject to labeling requirements of 27 CFR Part 16 and 27 CFR Part 25. In some States the requirements of 27 CFR Part 7 also apply.

Since growlers may be considered bottles we recommend that brewers silkscreen or label their growlers with all of the mandatory label information to avoid potential problems with growlers the brewer might subsequently refill under conditions that we would consider bottling. (See § 25.112 and 27 CFR Part 16.)

What is the mandatory label information?

You must label your beer with this information:

Brewery name or address

Place of production: the place of production is the city, and, if necessary for identification, the state. The place of production must appear in direct conjunction with your name or trade name. If you operate more than one brewery you must choose one of these options:

- ☐ Show all brewery locations on the label
- ☐ Show the place of production on the label
- ☐ Show your principal place of business on the label

In the event that you select to show all your locations or your principal place of business, rather than the place of production, you must also mark your label with a code to show which location actually produces the beer.

Net contents: show net contents as ☐ gallon. You may use .6 ounces in addition to but not in place of ☐ gallon.

Domestic or imported

Governmental: use the guidelines above (see 27 CFR Part 16).

Last reviewed/updated 05/26/2010

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► **B10: Am I permitted to label my product with a specialized farming term to show my compliance with or concern for environmental initiatives and movements?**

► **B11: May a brewer transfer bulk beer to a brewery, bonded wine premises, or distilled spirits plant?**

► **B12: Do I need a permit to import beverage alcohol products for my own use, or to ship or bring my personal alcohol collection into the U.S. from overseas?**

Page last reviewed January 2, 2015
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Maintained by Regulations and Rulings Division



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[Home](#) [Growler Labels](#)

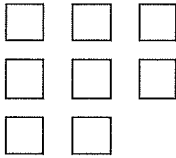
Refine Designs By

Personalized Growler Labels

Size

- 6" x 4" (13)
- 4" x 4" (3)
- 5" x 5" (3)

Color



Event & Occasion

- Expressions (7)
- Celebration (3)
- Holiday (1)
- Wedding (1)

Recipient

- For Anyone (2)

Topic

- Food &
- Beverages (3)
- Party Favor (1)

WATERPROOF &
SELF ADHESIVE

START NOW!



Custom Growler Labels - Design online, High Quality, self-adhesive and 100% waterproof.

Create your own Growler labels for your home-brew or just to fill up at your local microbrewery. Growler labels are available in three sizes and printed in full, crisp color on our high-end professional printing press. Scroll down the page to choose from pre-designed growler labels that you can modify or if you like you can start from scratch and Make Your Own growler labels. All of our growler labels are printed on a thick synthetic label stock that is completely waterproof and very durable.

Growler Labels: Are available in three sizes 4"x4", 5"x5" and 6"x4". See size guide.

Growler bottle labels ship out within two business days. Remember that shipping time is in addition to the two day production time so your order will arrive based upon your shipping method chosen at the time you checkout.

Make it yours! ☐ No setup fees ☐ Full-color printing ☐ 100% satisfaction guaranteed

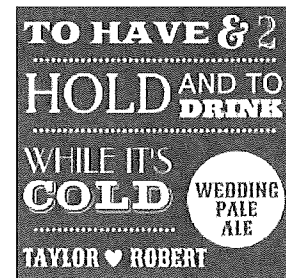
SELECT YOUR DESIGN



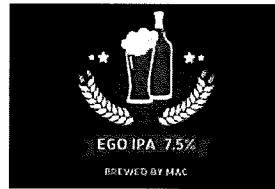
Pumpkin Stout
holiday growler labels
Multiple Options



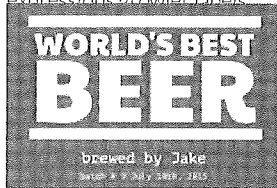
IPA
growler labels
Multiple Options



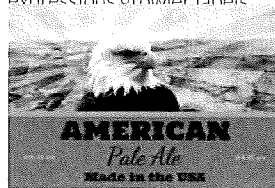
To Have & To Hold
wedding growler labels
Multiple Options



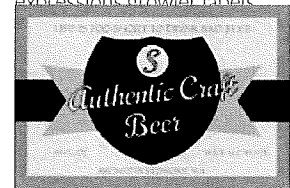
Three Step Process
 expressions growler labels



Homebrew
 expressions growler labels



Quality Guarantee
 expressions growler labels



World's Best
 expressions growler labels
 Multiple Options

American Eagle
 expressions growler labels
 Multiple Options

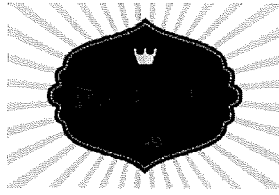
Authentic Craft
 expressions growler labels
 Multiple Options



Two Dogs
 expressions growler labels
 Multiple Options

Salty Sea Ale
 celebration growler labels
 Multiple Options

Retro
 celebration growler labels
 Multiple Options



All Original
celebration growler labels
Multiple Options